

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**WAYNE D. GARDENHIRE**  
Claimant

VS.

**THE BOEING CO.-WICHITA**  
Respondent

AND

**AETNA CASUALTY & SURETY COMPANY**  
Insurance Carrier

AND

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 170,764  
& 190,696

**ORDER**

Respondent and the Kansas Workers Compensation Fund appeal from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on November 13, 1995. The Appeals Board heard oral argument March 13, 1996.

**APPEARANCES**

Claimant appeared by his attorney, Tom E. Hammond of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Andrew E. Busch of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

**ISSUES**

This appeal relates only to the findings and conclusions entered by the Administrative Law Judge in Docket No. 170,764. In that case the Administrative Law Judge awarded claimant benefits based upon a 43 percent permanent partial general body disability. The Award was for functional impairment only because claimant had returned to work for respondent at a comparable wage. Although additional issues were initially

identified in the Applications for Review and briefs, at the time of oral argument the respondent and the Workers Compensation Fund indicated the only issues they wish to have addressed were those relating to :

- (1) The nature and extent of claimant's disability; and
- (2) The application of credit under K.S.A. 44-510a (Ensley) for a prior compensable permanent injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

- (1) Claimant is awarded benefits based upon a 30 percent permanent partial general disability.

The parties stipulated and the evidence establishes that claimant met with personal injury by accident arising out of and in the course of his employment. The record includes evaluations by Dr. Kenneth D. Zimmerman and Dr. Ernest R. Schlachter. Although claimant had previous claims for injury, both found additional injury and impairment caused by work activities during the period alleged. Dr. Zimmerman found additional injury to and rated the right shoulder and the right and left upper extremities. He combined these ratings to arrive at a general body rating of 16 percent. Dr. Schlachter, on the other hand, found additional injury and rated both the right and left shoulders as well as the right and left upper extremities. He combined his ratings to a general body impairment of 43 percent. The Administrative Law Judge relied exclusively on the evaluation by Dr. Schlachter to render her Award. Her Award states that she finds his opinion to be more persuasive in this case. The Appeals Board disagrees. It appears reasonable, in this case, to give equal weight to both opinions. In doing so, the Appeals Board concludes that claimant has a 30 percent permanent partial general disability.

Claimant has argued, in part, that it is inappropriate to give equal weight to these ratings when claimant settled a prior claim relating to the right upper extremity and shoulder for a 20 percent disability to the body as a whole. He argues that the Board should, therefore, not give equal weight to the 16 percent rating by Dr. Zimmerman. The Appeals Board concludes that the percentage of disability used for the settlement of the prior claim has little, if any, probative value in determining the nature and extent of claimant's current injuries. As the trier of fact, the Board is not bound in this case by the previous compromise agreement between the parties. Claimant would have been advised at that time he settled the prior claim that he might have been awarded more, and might have been awarded less, had that claim been tried to completion. At the time of the prior claim, Dr. Zimmerman determined claimant's impairment as less than the 16 percent he currently assigns. Giving equal weight to Dr. Zimmerman's and Dr. Schlachter's new ratings, reasonably measures the extent of the current disability.

The Appeals Board also notes that respondent had initially argued that the percentage of disability for the previous claim should be deducted from the percentage of disability awarded in this case. This argument was based upon an additional argument that claimant's date of accident was after July 1, 1993 when K.S.A. 44-501 was amended to require such deduction. The argument relating to the date of accident and, consequently, the argument relating to reduction for prior percentage of disability was abandoned at the time of oral argument. The Appeals Board finds, as did the Administrative Law Judge, that the date of accident should be September 17, 1992. The law, at that time, awarded benefits for the total resulting disability in cases involving injury which aggravated a preexisting condition. Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987).

(2) Respondent is entitled to credit under K.S.A. 44-510a (Ensley) for compensation paid on his previous workers compensation claim.

The Administrative Law Judge found that claimant was entitled to a credit for amounts paid in Docket No. 147,037. The injury, in that case, involved injury to the right upper extremity and shoulder. Dr. Schlachter rated the claimant on that prior claim, Docket No. 147,037, as well as the current claim. The finding by the Administrative Law Judge was supported by Dr. Schlachter's opinion that claimant would not have developed the condition he diagnosed relating for the current injury but for the aggravation and worsening of claimant's preexisting conditions as diagnosed in 1991 for Docket No. 147,037. The respondent asks the Appeals Board to affirm this finding, but notes that in calculating the amount of the Award the Administrative Law Judge failed to give credit for compensation paid on the previous claim. After reviewing the record, the Appeals Board finds and concludes that the Award should account for that prior claim and specifically finds that respondent is entitled to 192 weeks of credit at the rate of \$77.94 per week for the previous claim on the date of accident of August 4, 1988. The Award will, therefore, be modified accordingly.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated November 13, 1995 should be modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Wayne D. Gardenhire, and against the respondent, The Boeing Company-Wichita, and its insurance carrier, Aetna Casualty & Surety, and the Kansas Workers Compensation Fund, for an accidental injury which occurred September 17, 1992 and based upon an average weekly wage of \$727.64, for 10 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$2,990.00, followed by 192 weeks at the rate of \$67.60 per week or \$12,979.20 for a 30% permanent partial general body impairment of function during the period the credit applies and thereafter 213 weeks at \$145.54 or \$32,004.56, making a total award of \$46,969.22.

As of April 19, 1996, there is due and owing claimant 10 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$2,990.00, followed by 177.14 weeks of permanent partial disability compensation at the rate of \$67.60 per week in the sum of \$11,974.66, for a total of \$14,964.66, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$32,000.02 is to be paid for 14.86 weeks at the rate of \$67.60 per week or, \$1,004.54 followed by 213 weeks at \$145.54, until fully paid or further order of the Director.

The remaining orders of the Administrative Law Judge are hereby adopted by the Appeals Board as if same were fully set forth herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Tom E. Hammond, Wichita, KS  
Frederick L. Haag, Wichita, KS  
Andrew E. Busch, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director